Filed 7/26/19 In re B.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.M., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.C., Defendant and Appellant.	E072308 (Super.Ct.No. J271312) OPINION

APPEAL from the Superior Court of San Bernardino County. Erin K. Alexander, Judge. Affirmed.

Donna P. Chirco, by appointment of the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Dawn M. Martin, Deputy County Counsel, for Plaintiff and Respondent.

R.C. (mother) appeals from an order terminating parental rights to her son B.M. (B.). He had been placed with his grandmother, who wanted to adopt him

B. told a social worker that he wanted to live with the grandmother. He told the grandmother that he had "fears about living with [the] mother." At one point, the mother told him that he was going to live with her and would never see his beloved grandmother (or his beloved dog) ever again.

We will hold, based on such evidence (and more), that the trial court properly found that the beneficial parental relationship exception to termination did not apply.

I

FACTUAL AND PROCEDURAL BACKGROUND

When the dependency was filed, the mother and E.B. (stepfather) were married and living together. They were caring for three young boys:

1. B. — the subject of this dependency — four years old, who was the mother's son from her former relationship with M.M. (father);

2. M.B. (M.), two years old, who was the stepfather's son from a previous relationship; and

3. J.B. (J. or baby), two months old, who was the mother's son by the stepfather.

In June 2017, J. was admitted to the hospital. His breathing and his pulse had stopped. Once they were restored, he was found to have "old and new brain bleeds."[1]

[1] One doctor reported early on that the baby had a depressed skull fracture, but later tests seem to have ruled this out.

He "likely" had an earlier, healing fracture of the left thigh. He also had retinal hemorrhages.

The stepfather admitted "shaking the baby on two different occasions."

The first occasion was about two weeks earlier. According to the stepfather, during a feeding, the baby suddenly stopped moving and turned blue. The stepfather shook him to try to get him to respond. The baby was admitted to a hospital, where he was diagnosed as having an allergic reaction to his formula.

On the most recent occasion — again, according to the stepfather — M. hugged the stepfather's legs while he was holding the baby, causing him to drop the baby accidentally. The baby stopped breathing. Once again, the stepfather shook the baby to try to get him to respond.[2] This explanation was deemed to be inconsistent with the baby's injuries.

The mother was not home on either occasion.

When interviewed, B. said that both the mother and the stepfather spanked him with a belt. He also said that the stepfather grabbed and squeezed his face, causing bruises.

The mother admitted "mutual domestic violence" involving "pushing and shoving."

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[2] When he first called the mother to tell her the baby had been hurt, however, he said the baby "rolled off the couch . . . ." Similarly, he told police at first that the baby fell off a couch. When they said the baby's injuries could not be due to falling off a couch, he changed his story.

Accordingly, the Department of Children and Family Services (CFS) detained B. and filed a dependency petition concerning him.[3] He was placed with the father's mother (grandmother).

When the mother was interviewed, she "maintained that regardless of the forensic medical findings she believes her husband."

Due to lack of oxygen, J. had "significant brain damage." He could not breathe or eat on his own. He had seizures, muscle spasms, and neural "storming." He was unlikely to get better. As of April and May 2018, he was in a rehabilitation facility. The record does not reflect his fate thereafter.

In October 2017, at the jurisdictional/dispositional hearing, the trial court found jurisdiction over B. based on serious physical harm (§ 300, subd. (a)), failure to protect (*id*., subd. (b)), and abuse of a sibling (*id*., subd. (j)).[4] It ordered reunification services for the father but bypassed reunification services for the mother.

In or before May 2018, the grandmother expressed interest in adopting B.

Later in May 2018, at the six-month review hearing, the trial court terminated reunification services and set a hearing pursuant to section 366.26.

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[3] CFS also filed a separate dependency concerning J. M. was detained, but the record does not reflect any dependency concerning him.

[4] These and all further statutory citations are to the Welfare and Institutions Code.

In March 2019, after a three-day-long section 366.26 hearing, the trial court found that B. was adoptable and that there was no applicable exception to termination. Accordingly, it terminated parental rights.

II

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

The mother's sole contention on appeal is that the trial court erred by refusing to find that the beneficial parental relationship exception to termination applied.

A. *Additional Factual and Procedural Background*.

The evidence submitted at the section 366.26 hearing consisted of three specified social worker's reports, along with oral testimony. We consider only this evidence. (See Welf. & Inst. Code, § 366.26, subd. (b); Cal. Rules of Court, rule 5.725(d).)[5]

At the time of the section 366.26 hearing, B. was six. He had been placed with the grandmother for approximately one year nine months.

Although the mother had been denied reunification services, she was in therapy and had completed a parenting class and a domestic violence class. She testified that she would protect B. by "any means necessary."

The mother had supervised visitation once a week for three hours at a time. She also had phone visitation once a week. She visited consistently.

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[5] Photographs of the mother and B. were also admitted, but they have not been transmitted to us.

Her interactions with B. were "positive." They did different activities, such as playing soccer, doing arts and crafts, watching movies, listening to music, and playing games. On B.'s birthday, the mother brought relatives and hosted a labor-intensive party for him. For Halloween, she brought face paint and fake tattoos and they carved pumpkins.

Generally, the visits went well, and B. appeared to enjoy them. He was "affectionate"; he told the mother he loved her. He called her "Mom." She testified that he sometimes said he missed living with her. However, B. also referred to the grandmother as "Mom."

At the ends of visits, B. and the mother would hug and kiss. However, he went back to the grandmother willingly. According to the grandmother, B. once said the visits made him sad. He also said he had "fears about living with [the] mother."

In December 2018, according to the grandmother, B. disclosed that the mother had said he would be living with her, not with the grandmother. The mother also said she did not want B. to love the grandmother; he could love only her. When B. told the grandmother this, he was crying and upset. He "jumped into [the grandmother's] arms." She "hugged him a long time and let him know he will be living with [her] and not to worry at all about this."

In February 2019, B.'s teacher reported that he had "had an emotional episode in class . . . ." He told his friends "he was moving and he wouldn't be able to see them anymore." When the grandmother picked him up, he "came running to [her]." They

"hugged and talked." She told him not to worry, because "he's not going anywhere . . . he's staying right there with his friends and [his teacher] and [herself]." Later, he explained that he was upset because the mother had told him "that he was going to live with her for like 82 million years."

In March 2019, B. told the grandmother, "[the mother] said I won[']t see you or my dog ever again."[6] She told him, "That's not true." She also told him not to worry, because she was going to contact the social workers.

In the opinion of a social worker, B. "appear[ed] to be content and adjusting well." He "love[d] [the grandmother] dearly." He "recognize[d] her as his parental figure." A social worker asked B., "If you could live with anyone, who would you live with?" He answered, with the grandmother.

The trial court found that it was the grandmother, not the mother, who played the "parental role" in B.'s life. It further found that there was "no evidence of detriment" if parental rights were terminated. Alternatively, even assuming there was some detriment, it did not outweigh the "benefit from the stability of a permanent home through adoption . . . ."

B. *Discussion.*

"'At a section 366.26 hearing the court is charged with determining a permanent plan of care for the child.' [Citation.] The court may order one of three alternatives:

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[6] In B.'s opinion, his dog Goofy was "the best dog ever."

adoption, legal guardianship, or long-term foster care. [Citations.]" (*In re D.O.* (2016) 247 Cal.App.4th 166, 173.)

"'Adoption, where possible, is the permanent plan preferred by the Legislature.' [Citation.]" (In re D.O., *supra*, 247 Cal.App.4th at p. 173.) Thus, as a general rule, at a section 366.26 hearing, if the trial court finds that the child is adoptable, it must select adoption as the permanent plan and terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).) There is an exception to this rule, however, if "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" (*id.*, subd. (c)(1)(B)) for one of six specified statutory reasons. (*Id.*, subd. (c)(1)(B)(i)-(vi).) One such reason is that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i).)

"'"[B]enefit from continuing the . . . relationship"' means the parent-child relationship 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' [Citation.]" (*In re Collin E.* (2018) 25 Cal.App.5th 647, 663.)

"A parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child . . . . The relationship arises from the day-to-day interaction, companionship and shared experiences.' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive,

emotional attachment between child and parent. [Citations.] Further, . . . the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]" (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.)

"A parent asserting the parental benefit exception has the burden of establishing that exception by a preponderance of the evidence. [Citation.]" (*In re J.C.* (2014) 226 Cal.App.4th 503, 529.)

"In reviewing challenges to a trial court's decision as to the applicability of th[is] exception[], we . . . employ the substantial evidence or abuse of discretion standards of review depending on the nature of the challenge. [Citation.] We . . . apply the substantial evidence standard of review to evaluate the evidentiary showing with respect to factual issues, such as whether the child has a close and strong bond with a [parent]. [Citations.] However, a challenge to the trial court's determination of questions such as whether . . . there is a compelling reason for determining that termination of parental rights would be detrimental to the child '"is a quintessentially discretionary determination."' [Citation.] We review such decisions for abuse of discretion. [Citation.]" (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080.)

"'[B]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.' [Citation.]" (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.)

Here, B. clearly had "frequent and loving contact" and "pleasant visits" with the mother. Nevertheless, in a social worker's opinion, B. loved the grandmother "dearly" and viewed her "as his parental figure." He called the mother "Mom," but he called the grandmother "Mom" as well. He enjoyed the visits, but when they ended, he showed no hesitation about going back to the grandmother.

The clincher was that B. said himself that he wanted to live with the grandmother. He expressed "fears about living with [the] mother." He told the grandmother that the visits made him sad. In December 2018, after the mother told him that he was going to live with her, he was "very upset crying." In February 2019, after the mother once again told him that he was going to live with her, he had "an emotional episode" at school. And finally, in March 2019, the mother told him yet again that he was going to live with her, adding that was never going to see the grandmother or his dog again. Each time, B. went to the grandmother, seeking a parent's comfort from her — and she gave it to him, amply.

In sum, as the trial court found, there was no evidence that B. would suffer detriment if parental rights were terminated. To the contrary, the evidence showed that he was desperately in need of the permanency and stability that he would gain from being adopted by the grandmother.

The mother cites *In re Amber M.* (2002) 103 Cal.App.4th 681, which held that the lower court erred by declining to find that the beneficial parental relationship exception applied. (*Id*. at p. 691.) There, however, a bonding study found that the mother and one

child, Amber, "shared 'a primary attachment' and a 'primary maternal relationship' and that '[i]t could be *detrimental*' to sever that relationship." (*Id.* at p. 689, italics added.) A court-appointed special advocate testified that another child, Samuel, "loved and missed Mother and *had difficulty separating from her*." (*Id.*, italics added.) The advocate opposed adoption "due to the bond and love between Mother and the children . . . ." (*Id.* at p. 690.) The appellate court concluded, "There is no challenge to the fact that Amber and Samuel love and *miss* Mother and have a strong primary bond with her." (*Id.* at p. 690, italics added.) It is precisely such evidence of detriment that is lacking here.

The mother also cites *In re S.B.* (2008) 164 Cal.App.4th 289, another case holding that the lower court erred by declining to find that the beneficial parental relationship exception applied. (*Id.* at pp. 298-301.) But *S.B.*, too, featured significantly different facts. There, the child was "unhappy when visits ended and tried to leave with [the father] when the visits were over." (*Id.* at p. 298.) She spontaneously volunteered, "I wish I lived with you and Mommy and Nana." (*Id.* at p. 295.) Most important, an expert witness who had conducted a bonding study opined that "that, because the bond between [the father] and S.B. was fairly strong, there was a potential for harm to S.B. were she to lose the parent-child relationship." (*Id.* at p. 296.)

Significantly, the same court that decided *S.B.* later cautioned: "*S.B.* is confined to its extraordinary facts. It does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact. . . . [C]ontact between parent and

child will always 'confer some incidental benefit to the child,' but that is insufficient to meet the standard. [Citation.] (*In re C.F., supra,* 193 Cal.App.4th at pp. 558-559.)

Finally, the mother cites *In re E.T.* (2018) 31 Cal.App.5th 68, a third case holding that the lower court erred by declining to find that the beneficial parental relationship exception applied. (*Id*. at pp. 76-77.) In *E.T.*, however, the children "demonstrated anxiety, uncertainty and fear" when they were first removed from the mother. (*Id*. at p. 72.) There was evidence that separation from the mother caused them to be "sad [and] withdrawn and [to] act out." (*Id*. at p. 76.) The mother, however, was "was able to ease their fear and anxiety." (*Ibid*.) "[A]ll" of the mother's visits were "therapeutic." (*Id*. at p. 73.) The mother accepted that the prospective adoptive parents provided "important support" for the children and promised not to "cut off their contact." (*Id*. at p. 75.) No similar facts are present here. Indeed, here, the mother affirmatively created fear and anxiety for B. and threatened to create more by cutting off his contact with the grandmother.

We therefore conclude that the trial court properly found that the beneficial parental relationship exception did not apply.

III

DISPOSITION

The order appealed from is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.